

**IN THE INCOME TAX APPELLATE TRIBUNAL, 'H' BENCH  
MUMBAI**

**BEFORE: SHRI M.BALAGANESH, ACCOUNTANT MEMBER  
&  
SHRI RAHUL CHAUDHARY, JUDICIAL MEMBER**

**ITA No.6608/Mum/2019  
(Assessment Year :2013-14)**

ACIT, Circle-16(1) Room No.439, 4 <sup>th</sup> Floor Aayakar Bhavan M.K.Road, Mumbai – 400 020	Vs.	Shri Sunil Hingorani 104, Nibhana, Pali Hill Bandra (W) Mumbai – 400 050
<b>PAN/GIR No.AAAPH1482P</b>		
<b>(Appellant)</b>	..	<b>(Respondent)</b>

Assessee by	Shri Sanjay Parikh
Revenue by	Shri Amit Pratap Singh
<b>Date of Hearing</b>	<b>28/07/2022</b>
<b>Date of Pronouncement</b>	<b>28/09/2022</b>

**आदेश / O R D E R**

**PER M. BALAGANESH (A.M.):**

This appeal in ITA No.6608/Mum/2019 for A.Y.2013-14 arises out of the order by the Id. Commissioner of Income Tax (Appeals)-4, Mumbai in appeal No.CIT(A)-4/IT.Mum.10441/ACIT-16(1)/2017-18 dated 16/08/2019 (Id. CIT(A) in short) against the order of assessment passed u/s.143(3) of the Income Tax Act, 1961 (hereinafter referred to as Act) dated 30/03/2016 by the Id. Asst. Commissioner of Income Tax-16(1), Mumbai (hereinafter referred to as Id. AO).

2. The first issue to be decided in this appeal is as to whether the Id. CIT(A) was justified in deleting disallowance of Rs.12,00,000/- made on account of underwriting charges in the facts and circumstances of the instant case.

2.1. We have heard rival submissions and perused the materials available on record. We find that assessee is in the business of manufacturing of optical and lenses. During the year under consideration, the assessee has shown income from house property, loss from business and profession and income from other sources for which details and supporting evidences were filed during the course of assessment proceedings. During the course of assessment proceedings, the Id. AO noticed that assessee had debited a sum of Rs.12,00,000/- on account of underwriting charges. When show-caused as to why the same should not be disallowed as not incurred for the purpose of business, assessee filed detailed explanation vide letter dated 29/10/2015 as under:-

**h. Underwriting Charges Rs 12 lacs**

*M/s Reflect Optics (P) Ltd ["ROPL"] has been in the business of running restaurants and in the year under assessment was running a restaurant by the name of "Balthazar" at Juhu Road Opp Lido petrol Pump, Santacruz (W), Mumbai. The said restaurant was not doing well and Company wanted to close down the Said Restaurant because of continuous losses. Whereas, Assessee is also in the business of running various restaurants through its partnership firm namely "Payless A Optics" and based on its 8 years experience in hotel business expressed confidence in ROPL's business. Assessee was confident that based on its skilled management, support, experience and upgradation of menu, Balthazar Restaurant can give huge profits. Assessee felt that with his efforts he would be able to run the restaurant profitability and hence entered into a business arrangement with ROPL wherein Assessee assured ROPL and its directors that in case the turnover of the Said Restaurant was less than the threshold figure then he would underwrite a part of deficit turnover and in case of upside they would take share of upside. Further, the said arrangement would also enable Assessee's brand name going high in hotel business as one more*

*hotel chain would be added in its kitty and that too without making any hefty investment. Copy of business arrangement letter is enclosed herewith as Annexure P.*

*This was a commercial call on the part of the Assessee. Unfortunately in spite of their efforts the venture did not succeed and hence Assessee was made liable to loss by way of underwriting charges which has been duly claimed by Assessee. This being business loss which may kindly be allowed)*

2.2. The Id. AO however, did not agree to the aforesaid explanation of the assessee and concluded that underwriting commission incurred by the assessee is not related to the business of the assessee in its normal course. He also observed that these expenses are incurred by the assessee for the new business venture which is not related to the assessee's existing business and since there was no business activity, this expenditure would not be allowable. With these observations, the Id. AO disallowed a sum of Rs.12,00,000/- on account of underwriting charges in the assessment.

2.3. We find that the Id. CIT(A) had granted relief to the assessee by following the order of his predecessor for the very same issue in A.Y.2015-16. The relevant operative portion is reproduced in page 23 para 9.1 of his order. The Id. CIT(A) had also stated that there is neither any factual change nor any legal change with regard to the facts prevailing in A.Y.2015-16 and the facts prevailing during the year under consideration. It is pertinent to note that against the order passed by the predecessor the Id. CIT(A) for A.Y.2015-16, no appeal has been preferred by the Revenue before this Tribunal. Hence, that order of the Id. CIT(A) had attained finality. Hence, we do not find any infirmity in the present CIT(A) following his predecessor the Id. CIT(A)'s order on the very same issue for the year under consideration. Accordingly, the ground No.(i) raised by the Revenue is dismissed.

3. The ground No.(ii) raised by the assessee is challenging the deletion of addition of Rs.1,67,10,442/- made u/s.68 of the Act.

3.1. We have heard rival submissions and perused the materials available on record. We find from para 9 of the assessment order, the Id. AO had mentioned that assessee had credited an amount of Rs.1,67,10,442/- on account of gifts received from Shri Anil Hingorani. During the course of assessment proceedings, the assessee was asked to explain and furnish the occasion for which the gift was received creditworthiness of the donor, bank statement of the donor etc. In response to the query raised by the Id. AO, the assessee submitted that the gifts were received out of natural love and affection from his brother. It was explained that assessee had actually taken loans in earlier years from his brother which was converted as gift during the year under consideration. The Id. AO however, did not heed to the contentions of the assessee and proceeded to add the same as unexplained cash credit u/s.68 of the Act. The assessee before the Id. CIT(A) explained that his brother is a non-resident and entire details called for by the Id. AO could not be furnished at the time of assessment proceedings due to paucity of time. Accordingly, he requested for admission of additional evidences containing bank statement, confirmation from brother confirming the gift together with other details that were called for by the Id. AO. The Id. CIT(A) appreciated the contentions of the assessee and admitted those additional evidences and forwarded to the Id. AO seeking for remand report. The Id.AO submitted the remand report vide letter dated 24/07/2019, wherein the Id. AO had mentioned that assessee had first transferred loans from Shri Anil Hingorani which was appearing in the books of his proprietorship concern i.e. Savy Designs to his capital

account and correspondingly transferred the same as gift in his personal books of accounts. The Id. AO acknowledged the furnishing of following documents by the assessee:-

- a) Bank A/c statement of Anil Hingorani
- b) Bank A/c statement of the assessee Sunil Hingorani
- c) ITRs filed by Anil Hingorani
- d) Ledger A/c of Anil Hingorani in the books of assessee (personal)
- e) Ledger A/c of Anil Hingorani in the books of Savy Design (assessee's proprietorship concern)
- f) Financial statements of a company, viz., East Optical Co. Ltd., in which Anil Hingorani & his son are the shareholders

3.2. After necessary verification, the Id. AO had admitted that assessee had established the identity and creditworthiness of the donor. The Id. AO acknowledged the fact that the amount of loan payable to Shri Anil Hingorani by Savy design, proprietorship concern of the assessee was converted into gift by crediting the amount to assessee's capital account. According to the Id. AO, this was a colourable devise used by the assessee to avoid payment of tax. The Id. CIT(A) however by appreciating the fact that the assessee had duly discharged its onus in terms of section 68 of the Act and that no monies were received by the assessee during the year, granted relief to the assessee by deleting addition made u/s.68 of the Act. Aggrieved, the Revenue is in appeal before us.

3.3. It is not in dispute that the assessee's proprietorship concern Savy Designs had borrowed loan from Mr. Anil Hingorani in earlier years. At the time of receipt of loan, no addition has been made u/s.68 of the Act in the hands of the assessee. It is not in dispute that this loan lying in the

proprietorship concern books of the assessee is converted as gift during the year under consideration. Thus, there was no fresh receipt of money during the year under consideration. Hence, on this count itself, the provisions of Section 68 of the Act could not come into operation at all. In any case, we find that the Id. AO in the remand report had agreed that the creditworthiness of the donor is established in addition to identity and genuineness of the transaction. The Id. CIT(A) had categorically stated that there is nothing on record brought by the Id. AO to show that the transaction of gifts are of doubtful nature. In any case, this is nothing but gift received by the assessee from his own brother which would be exempt u/s.56(2) of the Act. On this count also no addition could be made in the hands of the assessee in respect of the gift. It is also a fact on record that gift has been duly confirmed by the brother that the money is payable to him by the proprietary concern is being converted into gift out of natural love and affection. This transaction by any stretch of imagination cannot be construed as a colourable device, hence the decision relied upon by the Revenue in the case of McDowell and company reported in 154 ITR 148 of the Hon'ble Supreme Court is of no relevance to the facts of the case. When the provisions of Section 68 of the Act per se could not be made applicable, as no receipt of money was available during the year under consideration and in view of the fact that gift has been received only from assessee's own blood brother (which would be exempt from tax), the decision relied upon by the Revenue on the Hon'ble Supreme Court in the case of CIT vs.Durga Prasad More reported in 82 ITR 540 and in the case of Sumati Dayal reported in 214 ITR 801 does not come to the rescue of the Revenue. The gift confirmation also says that the same is irrevocable. In view of these documents which remained uncontroverted before us and in view of the aforesaid observations, we have no hesitation in confirming the order of

the Id. CIT(A) granting relief to the assessee in this regard. Accordingly, the ground No. (ii) raised by the Revenue is dismissed.

4. The ground No. (iii) raised by the Revenue is challenging the deletion of addition of Rs.27,00,000/- made on account of advance received towards sale of shares of Fusion Cuisines Pvt. Ltd., (FCPL).

4.1. We have heard rival submissions and perused the materials available on record. The Id. AO on perusal of the Schedule III of personal balance sheet of the assessee under the head 'other current liabilities' observed that assessee has shown advance towards shares of FCPL from BJN Hotels Pvt. Ltd., The assessee when confronted with the same, submitted that it is advance received from BJN towards sale of shares of FCPL which is in dispute and pending before the Hon'ble Court. The assessee also provided Court order along with explanation vide letter dated 22/03/2016. The Id. AO observed that if the matter is disputed till date, then assessee must have refunded the money to BJN as sale of shares of FCPL did not materialise. He also observed that in the court, the complaint was regarding cheques dishonoured and not exactly related to sale of shares. Accordingly, he proceeded to treat the receipt of advance of Rs.27,00,000/- as income of the assessee without mentioning under what provisions of the Act, the said receipt is taxable in the eyes of law. This was deleted by the Id. CIT(A).

4.2. We find that assessee was holding 50,500 shares of Rs.100/- each of Rs.50,50,000/- of FCPL. Vide an agreement, the assessee agreed to sell his entire shareholding in FCPL to M/s BJN Hotels Pvt. Ltd., for a consideration of Rs.68,00,000/-. The assessee received an advance of Rs.27,00,000/- towards sale of shares of FCPL from BJN during the year

under consideration. However, certain disputes arose between parties and also because of death of Mr. P.B. Nichani, the key person of BJN, shares of FCPL could not be transferred to BJN. We find that the Id. CIT(A) had categorically held that shares held by the assessee in FCPL was continued to be shown in the balance sheet of the assessee under the head "investments". These shares were purchased by the assessee in 2007 and have held for more than six years and were purchased as strategic investment. These facts were not controverted by the Revenue before us. In any case, we find what is received by the assessee is only advance for sale of shares and the shares of FCPL continued to remain with the assessee as on the balance sheet date. That itself goes to prove that the said shares were not transferred by the assessee. It is also not in dispute that the shares in FCPL were held in the form of investments of the assessee and not as 'stock in trade', We find that the Revenue had sought to apply provisions of Section 51 of the Act to treat the said advance as monies forfeited and thereby liable to tax in the hands of the assessee. In this regard, we find that this aspect has already been addressed by the Id.CIT(A) in para 11.2 of his order, wherein, it was held that there is no provision to treat the forfeited amount as income of the assessee and that even the amendment brought in by the Finance Act (No.2), 2014 effective from 01/04/2015 in Section 51 by way of insertion of proviso which is prospective in nature provided that the forfeited amount shall be deemed of income of the year in which forfeiture has been made. The shares of FCPL, as stated earlier is continued to be shown as investment in the balance sheet of the assessee and the same were not transferred at all. Hence, by no stretch of imagination, this advance receipt of Rs.27,00,000/- could be brought to tax under any provisions of the Act applicable to the year under consideration, Hence, we find no infirmity in

the order of the Id. CIT(A) granting relief to the assessee in this regard. Accordingly, the ground No. (iii) raised by the Revenue is dismissed.

5. The ground No.(iv) and (v) raised by the Revenue are general in nature and does not require any specific adjudication.

**6. In the result, appeal of the Revenue is dismissed.**

Order pronounced on 28/09/2022 by way of proper mentioning in the notice board.

**Sd/-**  
**(RAHUL CHAUDHARY)**  
JUDICIAL MEMBER

**Sd/-**  
**(M.BALAGANESH)**  
ACCOUNTANT MEMBER

Mumbai; Dated 28/09/2022  
KARUNA, *sr.ps*

**Copy of the Order forwarded to :**

1. The Appellant
2. The Respondent.
3. The CIT(A), Mumbai.
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

//True Copy//

BY ORDER,

(Sr. Private Secretary / Asstt. Registrar)  
ITAT, Mumbai